Alleghany Warehouse Company, Inc., and Star Warehouse Corporation and Joseph Goode, Sr., Petitioner, and International Longshoremen's Association, AFL-CIO, Case 5-RD-691

May 18, 1981

DECISION ON REVIEW AND DIRECTION OF SECOND ELECTION

On August 29, 1980, the Regional Director for Region 5 issued a Supplemental Decision, Denial of Employer's Motion for Dismissal of Union's Objections to Election, Order and Direction of Second Election in the above-titled proceeding, in which, inter alia, he denied the Employer's motion for dismissal of the Union's objections for the Union's failure to comply with the Board's rules regarding service of objections on parties to the proceeding, sustained one of the Union's objections to the election, and ordered a second election. Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's Supplemental Decision on the grounds, inter alia, that, in denying its motion to dismiss the objections and by sustaining the Union's objection, the Regional Director departed from established Board precedent. The Union filed an opposition to the Employer's request for review.

By telegraphic order dated November 7, 1980, the Employer's request for review was granted.

The Board has considered the entire record in this case with respect to the issues under review, including the Union's opposition to the Employer's request for review, and makes the following findings:

On June 24, 1980, ¹ the Regional Director conducted a secret-ballot election pursuant to a petition for decertification election, which the Union lost. ² Thereafter, on June 30, the Union mailed its objections by express mail to the Regional Director, which were timely filed on July 1. The Union simultaneously mailed copies of its objections, by regular mail, to the Employer and the Employer's counsel. Petitioner also was served by regular mail. The Union's letter to the Regional Director accompanying its objections stated that such service on the parties was made. ³ The Employer avers that

neither it nor its counsel received a copy of the Union's objections until July 7 or 8. Thereafter, on July 16, the Employer filed a Motion for Dismissal of Union's Objections to Election, contending that the Union failed to comply with Section 102.69(a) of the Board's Rules and Regulations.⁴

Based on the above facts, the Regional Director denied the Employer's motion to dismiss the objections. The Regional Director found that the Union mailed its objections simultaneously to the Regional Director and to each of the parties, albeit by different methods of service, and that a statement of service accompanied the objections filed with the Regional Director. He found further that the Employer did in fact receive a copy of the ojections 7 days after their receipt by the Regional Director, well before the Employer filed its motion to dismiss. He concluded that here, unlike in Auto Chevrolet, Inc.,5 and Platt Brothers,6 cited by the Employer in its motion to dismiss, the Union showed "an honest attempt to substantially comply with the requirements of the Rules" regarding service of objections. Accordingly, the Regional Director denied the Employer's motion to dismiss. Then, considering the objections, the Regional Director found that the Employer made objectionable promises of benefits if they voted against the Union and threats of the denial thereof if the employees voted in favor of the Union, and consequently directed a second election.

In its request for review, the Employer contends that, in denying its motion to dismiss, the Regional Director misapplied Section 102.69(a) of our Rules. The Employer states that the Board's Rules do not require that objections be *simultaneously* mailed to the Regional Office and to each of the parties, but rather that each of the parties be *immediately* served with copies of the objections. The Employer asserts that the Union knowingly failed to comply with the requirements of immediate service because it used a different and slower procedure in

¹ Unless otherwise noted, all dates hereinafter are in 1980.

² Pursuant to a Decision and Direction of Election, an election was conducted in the appropriate unit of "all full-time and regular part-time warehouse employees employed by the Employer at its Richmond, Virginia, locations, excluding office clerical employees, executives, watchmen, guards and supervisors as defined in the Act." The tally of ballots served on the parties indicated that 21 voted for, and 53 voted against, the Union

³ In his dissent, Member Jenkins states that, notwithstanding the Union's statement of service accompanying the objections, which avers

that the Union simultaneously served copies of the objections on Petitioner, the Employer, and the Employer's counsel, the copy Petitioner received was postmarked more than 2 weeks after the date of filing. We find it unnecessary to pass on the timeliness of the service on Petitioner, as neither the Employer nor the Petitioner has raised this issue.

⁴ Sec. 102.69(a) states:

Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made. . . .

^{5 249} NLRB 529 (1980).

^{8 250} NLRB 325 (1980).

⁷ Alfred Nickles Bakery, Inc., 209 NLRB 1058, 1059 (1974).

mailing its objections to the parties than it used to file those objections with the Regional Director, and consequently the Board should grant its motion to dismiss. We disagree.

We note at the outset that in Auto Chevrolet we reaffirmed the principle enumerated in Alfred Nickles that in order to support a variance or deviation from the clear requirements of our rules the objecting party must show "an honest attempt to substantially comply" with the rules on service of objections. We note further that Section 102.112 of the Board's Rules and Regulations, governing the manner in which service of objections is to be made, provides in relevant part that "[s]ervice of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending," and that "service on all parties shall be made in the same manner as that utilized in filing the paper with the Board."

Thus, the Union's service of its objections on the Employer by regular mail was technically not in compliance with our rules regarding the proper manner of service. We must therefore determine whether the Union made "an honest attempt to substantially comply" with our rules such that its deviation from our rules can be excused. We conclude that such an attempt has been made.

The Employer concedes that the Union placed the objections in the mail to it on June 30, at the same time that it mailed its objections to the Regional Director, and that a statement of service accompanied the filed objections. The Employer further admits that it received a copy of the objections on July 7, and that it did not file its motion to dismiss until July 16. These facts distinguish the instant case from our recent Decision in High Standard, Inc. 8 There, the Board granted the employer's motion to dismiss where the employer never received a copy of the objections, and the petitioner did not indicate, in a certificate of service or other document executed contemporaneously with its filing of objections, that copies of such objections had been mailed to the parties to the proceedings. Here, in contrast, the Union made actual service on the Employer and provided contemporaneous evidence of that service.9 We conclude, therefore, that the particular facts herein are sufficient to support the Union's departure from strict adherence to our rules, for to dismiss the objections on the facts presented herein would require a "slavish adherence to form rather than substance" which is not intended by our Decision in *Alfred Nickles* and *Auto Chevrolet*. Accordingly, we agree with the Regional Director and deny the Employer's motion to dismiss the objections.

In its telegram dated November 7, the Board also granted Respondent's request for review of the Regional Director's decision insofar as he sustained the Union's Objection 3. The Regional Director found that, in a notice posted approximately 1 month before the election, the Employer stated that, after the election, the Employer "would know your wishes and whether to go ahead and put a fair wage increase into effect if the ILA lost, or get into negotiations if it won and negotiate wages with the ILA like we did last year." Thereafter, in a letter to employees dated 4 days before the election, the Employer stated:

If you vote "NO" on Tuesday, we no longer must deal with the ILA and can return to the pre ILA practice of a fair wage increase in July, with inflation and prices going up everywhere we all would appreciate that. If you vote "YES" we'll continue bargaining with the ILA the same as we did last year. We hope it wouldn't take 10 months of bargaining as it did last time. However, if the ILA does strike, we don't know how long it would take.

The Regional Director found each of these statements objectionable, in that they contained an implied promise of a wage increase and threats of the denial thereof, by, in effect, offering the employees a choice between an immediate wage increase if they voted against the Union in the decertification election or the possibility of lengthy bargaining and seemingly small gains in wages should the Union be recertified. Accordingly, he ordered that the election be set aside, and directed a second election.

In its request for review, the Employer contends that its statements were not objectionable, since they were an accurate statement of the law and facts. Moreover, the Employer attempts to distinguish this case from W. F. Hall Printing Company, 11 relied on by the Regional Director, because here, unlike in that case, there was no threat that employees would be denied a wage increase if they failed to decertify the Union, nor did the Employer threaten to negotiate in bad faith if the Union won.

For the reasons set forth above, we agree with the Regional Director's findings that the Union's Objection 3 should be sustained. Accordingly, we

^{8 252} NLRB 403 (1980)

⁹ Moreover, we note that the Union filed its objections just before the Fourth of July holiday, and in fact the Employer received the objections only 3 working days after the objections were filed with the Regional Director.

¹⁰ The Nestle Company, 240 NLRB 1310, 1311 (1979).

^{11 239} NLRB 51 (1978).

hereby set aside the June 24 election and direct that a second election be held.

[Direction of Second Election omitted from publication.]¹²

MEMBER JENKINS, dissenting:

Although my colleagues seek to distinguish this case factually from High Standard, Inc., 252 NLRB 403 (1980), they are unable to show why this case is not controlled by what we held there. In High Standard, we reaffirmed the proposition that strict compliance with our published rules respecting the service of copies of election objections would be excused only upon a showing of an honest attempt at substantial compliance or a compelling reason for noncompliance. We held that in the absence of such a showing the failure to serve a party by registered or certified mail, or by a method of service acceptable in civil actions in the appropriate State, was fatal; service by regular mail, even if accomplished at the same time the objections were mailed to the Board for filing, was insufficient unless we were satisfied that the law of the State sanctioned that method.

High Standard fits the instant case. The fact that, here, a statement of service by regular mail accompanied the filed objections is insignificant. A proper statement of service (which this was not because the manner of stated service was deficient) affects only the acceptability of the filing, not the validity of the service. The Employer's receipt, a week after the filing date, of the copy mailed to it, does not change the situation, because it is "irrelevant whether the party on whom service should have been timely made was prejudiced by the failure to comply with our service requirements." High Standard, supra. For the same reason, I find totally

unpersuasive the fact that the Employer took an additional week to file its motion to dismiss.

My colleagues' reliance on The Nestle Company, 240 NLRB 1310, 1311 (1979), for the proposition that upholding the service requirements here would constitute a "slavish adherence to form over substance" is surely misplaced. There, we dealt with the adequacy of the objecting party's showing that it attempted to comply with the service requirements, and found that it complied as soon as possible under the circumstances. Cf. Bechtel Incorporated, 218 NLRB 827 (1975). Here, in contrast, we have before us a party which for reasons best known to itself chose an unauthorized method of service. The Union deviated not only from the registered or certified mail requirement, but also from the separate requirement that service on the parties be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner.¹³ Moreover, the Union's statement of service notwithstanding, the copy of the objection it served on Petitioner, undisputedly one of the parties on whom timely service was required, was postmarked more than 2 weeks after the date of filing. 14 I am forced to conclude that there was neither substantial compliance with the service requirements nor an adequate showing that the deficiencies were excusable.

Accordingly, I would dismiss the objections and certify the results of the election.

^{12 [}Excelsior footnote omitted from publication.]

¹³ National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.112. The Union filed the objections with the Regional Director by mailing them by express mail on June 30, 1980, in order to insure their arrival by July 1, the last day on which they could be filed. It served the Employer by first class mail.

¹⁴ I am not as impressed, as the Regional Director was, that Petitioner, presumably not represented by an attorney, failed to file a separate motion of his own to supplement the Employer's motion to dismiss the objections for invalid service.